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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF: INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY

Report of the Special Rapporteur on the independence of judges and and lawyers, Dato' Param Cumaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/39

Addendum

Preliminary report on the mission to Italy

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Introduction

1. The present preliminary report concerns a mission to Italy undertaken from 11-14 March 2002 by the Special Rapporteur on the independence of judges and lawyers pursuant to his mandate in Commission on Human Rights resolution 1994/41 as renewed by resolutions 1997/23 and 2000/42. The mandate calls upon the Special Rapporteur, inter alia, to inquire into any substantial allegations transmitted to him and report his conclusions and recommendations thereon.

2. In January 2002 the Special Rapporteur received reports of nationwide protests by magistrates, including prosecutors,* at the start of the legal year to express their concerns about the Government's attempts to undermine their independence. The protests were called by the National Association of Magistrates of which 95 per cent of the judges and prosecutors of Italy are members. The Special Rapporteur had been receiving information of growing tension between the magistrates, including prosecutors, and the Government which appeared to have culminated in the protest.

3. On 23 January 2002 the Special Rapporteur wrote to the Government expressing his concerns and seeking an urgent mission to the country in order to ascertain the cause of the protests and the tension and to assist in finding a solution. The Government responded promptly and invited the Special Rapporteur to visit the country.

4. During the course of the mission the Special Rapporteur visited the cities of Rome and Milan. In Rome he met senior judges, government officials and members of Parliament, including the President of the Court of Cassation, the Prosecutor General at the Court of Cassation, the Minister of Justice, the Presidents of the Commissions of Justice of the Senate and Chamber of Deputies, the Vice-President of the Higher Council of the Judiciary, the National Association of Magistrates and the National Bar Association. In Milan the Special Rapporteur met the Milan Chapter of the National Association of Magistrates, the Prosecutor General of Milan, Dott. F. Saverio Borelli, and prosecutors D'Ambrosio and Boccassini.

5. The Special Rapporteur thanks the Government, including its Permanent Mission in Geneva, for facilitating the mission and providing assistance, cooperation and hospitality with cordiality.

6. In view of the very short time available between this mission and the fifty-eighth session of the Commission, the Special Rapporteur can only express his preliminary observations and recommendations.

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* In Italy both judges and prosecutors are called "magistrates" and are members of the judiciary.

I. PRELIMINARY OBSERVATIONS

7. The independence of the judiciary is enshrined in the 1948 Constitution. Prosecutors enjoy the same independence which is also enshrined in the Constitution. Appointments of judges and prosecutors, transfers, promotions and discipline are handled by the Higher Council of the Judiciary, which is a constitutional institution.

8. No one with whom the Special Rapporteur spoke disputed that there is tension between the judges and prosecutors, on the one hand, and the Government on the other. With the Government's majority in Parliament, that institution too is involved in the increase of the tension.

9. Over the years serious attacks have been levelled at some judges for their decisions and conduct. This is evident from resolutions of the Higher Council of the Judiciary dated 15 December 1999 and 2 October 2001. Some judges and prosecutors have been characterized as leftist, particularly those in Milan who, about a decade ago, began investigating corruption among political elites and still continue to do so.

10. A sore point is the cumbersome trial and appellate processes, both in criminal and civil cases. It was said that the average time needed to dispose of a criminal case is 9 years, and a civil case 10 years. In his speech to the Extraordinary Session of the Higher Council of the Judiciary on 2 October 2001 the Vice-President of the Council described the criminal trial process as "a perverse game of snakes and ladders". The European Court of Human Rights has on many occasions severely criticized these delays as inconsistent with article 6 of the European Convention on Human Rights. These cumbersome procedures are often taken advantage of by accused persons and defendants to delay due process, resulting in cases being barred by statutes of limitation.

11. The public, quite rightly, is disenchanted with a judicial procedure characterized by such long delays. Judges and prosecutors feel that the Government in addressing this problem often attributes the ills in the system to them. Thus public opinion is directed against the magistrates.

12. On this issue the Special Rapporteur finds that the entire system of the administration of justice and its procedures, both in the first instance and appellate levels, need urgent attention. All parts of the system need to be addressed, not just judges and prosecutors. The problem is deeply rooted in the procedures and the abuse of the procedures by all parties. Ad hoc piecemeal reforms are perceived as targeting the judges and prosecutors and further perceived - and quite rightly so - as a threat to their independence and impartiality.

13. Another aggravating factor is the three pending criminal cases before the Milan courts involving charges of corruption and false accounting of prominent politicians. One is the Prime Minister; the other is a prominent member of Parliament, Mr. Previti. The Special Rapporteur does not wish to elaborate on these cases or comment on their merits as they are at

present pending before the courts, and one case is pending before the Court of Cassation on application for transfer from the Milan courts. It is said that if these cases were transferred out of Milan to another venue then the entire processes will have to be commenced de novo. It is possible that the statutes of limitation may come into effect before the trials are completed. The manner in which procedural points are used to delay these cases is a matter of concern, including the perceived use of the legislative process to enact legislation which is then used in the conduct in the cases. One such piece of legislation is that on rogatory letters ratifying a bilateral agreement with Switzerland with retroactive effect. Whether it could affect evidence already admitted in the trial is an issue before the Milan courts in one of the high-profile cases.

14. Lawyers acting for these personalities are also members of Parliament and therefore perceived to have influence in Parliament to advance their clients' causes in Parliament. This results in issues of conflict of interest.

15. What ultimately sparked the nationwide protests at the opening of the legal year was the Senate resolution of 4 December 2001 accusing magistrates of failing to comply with the Constitutional Court ruling that judicial process does not have precedence over parliamentary business but that both had equal standing. Although the resolution was targeted at a decision by the Milan judges involving one of the high-profile criminal cases, this was seen as a serious provocation and interference with the independence of the judiciary in general.

16. The situation was the following: Mr. Previti repeatedly asked for the postponement of his court hearing because of his parliamentary obligations. The magistrate granted those requests. After the Constitutional Court's ruling, the magistrate deemed that the repeated postponements had led to excessive delay and decided that the need to proceed with the trial should prevail over parliamentary obligations. Parliament felt the decision was wrong and referred the issue to the Constitutional Court. Thereafter, an application by Mr. Previti to annul the whole trial and commence afresh was refused by the magistrate. The lawyers for the accused argued that the magistrate failed to comply with the ruling of the Constitutional Court. The magistrate is of the view that it is for the court to interpret the ruling of the Constitutional Court.

17. The Senate resolution also referred to meetings of magistrates as having examined ways not to apply a law of the State. This was refuted by the National Association of Magistrates in their meeting with the Special Rapporteur. They assert that what had occurred was that, at a seminar held as part of a training programme for magistrates, the interpretation of the legislation on rogatory letters was discussed.

18. A group of legal academics issued a public statement expressing concern over the Senate resolution. The Special Rapporteur studied the resolution and the events which led to its adoption and shares the concerns of the judges and prosecutors and the legal academics. What further aggravated the situation was that prior to the adoption of the resolution the Deputy Minister of the Interior had called for the arrest of the magistrates concerned. The Deputy Minister subsequently resigned.

19. Mention must be made of one particular individual in Milan who appears to have been singled out for attacks as a result of a speech he made in Milan at the opening of the legal year. He is the Prosecutor General of Milan, Dott. Francisco Saverio Borelli. The Prosecutor General outlined the issues confronting the administration of justice and commented on the delays encountered in some trials and also on the Government's proposed reforms. In conclusion, he called on the people to "resist, resist, resist" attempts to erode the system. His concluding remarks were widely reported by the media and criticized by the Government as being provocative and political. He is one of those characterized as leftist.

20. The Prosecutor General explained to the Special Rapporteur that his concluding remarks had been taken out of context: he had never urged the people to resist the Government; he had called for resistance to the "degradation of the sense of legality, rule of law and the campaigns to discredit the judiciary". In the present charged environment his remarks taken in isolation could be perceived as intemperate for a judicial figure. However, his speech in its totality certainly did not advocate rebellion or resistance to the Government.

21. Amidst this tension the Minister of the Interior called for reduction of the protection given to judges and prosecutors. Among those affected in Milan is Ms. Ilda Boccassini, who has been involved in the investigation of one of the high-profile cases. This is perceived as another threat to the independence of the judiciary. The Prosecutor General of Milan alluded to this in his speech. The Minister of the Interior has indicated that he would sue the Prosecutor General. (Since the mission the Special Rapporteur has received information that the earlier protection extended to Ms. Boccassini has been reinstated. The Special Rapporteur welcomes this act as Ms. Boccassini had expressed her fears to him.)

22. During the mission the Council of Ministers approved a law which would separate the judicial and prosecutorial functions of magistrates. This is perceived by the magistrates as more interference and another threat to their independence. On the basis of the explanation of the Minister of Justice, the Special Rapporteur finds some merit in this legislation for the separation of functions.

23. A practice of some concern is the taking of leave of absence by judges and prosecutors, who are appointed for life, to go into politics. Later, if they so wish, they can return to their work as judges or prosecutors. This practice could compromise judicial independence.

24. In the light of the events outlined above, the Special Rapporteur is satisfied that there is reasonable cause for the judges and prosecutors to feel that their independence is threatened. Though the Government's attacks have been directed at certain judges and prosecutors, yet it must be remembered that attacks on a few will be perceived as attacks on the entire judiciary, even as an attack on the rule of law.

25. On the other hand, judges and prosecutors should not conduct themselves in a manner which could compromise their independence and impartiality.

26. The cumbersome legal system and its procedures and the high-profile criminal cases before the Milan courts and the manner in which these procedures are taken advantage of to delay the trials have contributed to the present situation. Added to this is the perception that legislative processes are used to enact legislation which is then used in cases already before the courts.

27. These developments have led to mutual suspicion and mistrust between the Government and the judges and prosecutors. Every reform affecting the administration of justice is perceived with suspicion and to be a threat to their independence. Judicial decisions, particularly in the high-profile cases in Milan, are viewed as being partisan and leftist.

28. With regard to the competing importance of the judicial process and parliamentary business which was the core issue in the Senate resolution of 4 December 2001, what may have been overlooked is the fact that the absence of a single member of Parliament during parliamentary sessions will not disrupt or delay parliamentary business. However, without the presence of the accused in court to answer the charges against him the trial cannot proceed and his absence therefore will disrupt and delay judicial process. This is the difference. Following this rationale judicial process must necessarily be given precedence in given circumstances. Further, article 14 (3) (c) of the International Covenant on Civil and Political Rights and the corresponding expression in article 6 of the European Convention on Human Rights provide that criminal cases should be tried without undue delay. It is the duty of the courts to see that these cases are tried and adjudicated without delay.

29. The Independence of the judiciary and the independence of prosecutors is not only well entrenched in the Constitution, but also in the culture and tradition of Italy. No Government, however powerful, could take away this basic tenet of Italian society. Milan was the birthplace of the United Nations Basic Principles on the Independence of the Judiciary. Rome is the birthplace of the International Criminal Court which will soon be established. Nevertheless, recent events have shown signs of threat to this independence, but once the root causes are removed and mutual trust restored, the tension will ease and judicial independence will triumph and will be respected by all.

II. PRELIMINARY RECOMMENDATIONS

30. The prominent politicians facing charges before the Milan courts should respect the principles of due process and should not be seen as delaying that process. Though they, like any other citizen, are entitled to all the rights available to the defence, because they are in positions of power delaying the judicial process in their cases would be perceived with suspicion and could be detrimental to the integrity of the justice system.

31. The decisions of the courts must be respected by all. Though such decisions can be commented on and even criticized, the judges who make the decisions should not be attacked and subjected to any form of calumny by anyone or any institution. If decisions are perceived as incorrect, then the proper appellate procedures must be invoked.

32. During the course of the mission, in his discussions with the Minister of Justice and the Presidents of the Justice Commissions of the Senate and Chamber of Deputies the Special Rapporteur urged that there be set up a coordinating committee of representatives of all segments of the administration of justice, including the Higher Council of the Judiciary, the National Association of Magistrates, bar associations, legal academia and the Ministry of Justice, to address reform of the justice system in a holistic and comprehensive way. The present ad hoc approach taken by the Ministry of Justice is not satisfactory and is fraught with suspicion and mistrust. (Since he returned from his mission the Special Rapporteur has received information that the Government has accepted this recommendation. The Minister of Justice will establish such a committee in due course. This is a very positive and welcome development. The success of this committee will depend largely on the full cooperation of all actors, who must set aside their individual interests and adopt the interest of justice for the people as their collective interest.)

33. The Special Rapporteur will continue to monitor developments and will make himself available to the Government and the judiciary for any assistance or advice. He will submit a further report to the fifty-ninth session of the Commission.